

The Honorable Ricardo S. Martinez

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE**

STATE OF WASHINGTON,

Plaintiff,

v.

SECURE COMPUTER, LLC, et al.,

Defendants.

NO. C06-0126RSM

CONSENT DECREE AS TO  
DEFENDANTS SECURE  
COMPUTER, LLC AND PAUL E.  
BURKE

**I. DECREE SUMMARY**

- |     |                            |  |
|-----|----------------------------|--|
| 1.1 | Decree Creditor:           | State of Washington                    |
| 1.2 | Decree Debtors:            | Paul E. Burke and Secure Computer, LLC |
| 1.3 | Principal Decree Amount:   |  |
|     | a.                         | Costs and Fees: \$725,000.00           |
|     | b.                         | Restitution: \$75,000.00               |
|     | c.                         | Civil Penalties: \$200,000.00          |
|     | d.                         | Total Judgment: \$1,000,000.00         |
| 1.4 | Post-Decree Interest Rate: | 12 percent per annum                   |

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1.5 Attorneys for Decree Creditor: Paula Selis, Senior Counsel  
Katherine Tassi, Assistant Attorney  
General

1.6 Attorneys for Defendants: Spencer D. Freeman for Paul E. Burke;  
Robert S. Apgood for Secure Computer

Plaintiff, State of Washington, having commenced this action on January 24, 2006, pursuant to the Controlling the Assault of Non-Solicited Pornography and Marketing Act (“CAN-SPAM”), 15 U.S.C. § 7701, *et seq.*; the Washington State Consumer Protection Act (“CPA”), RCW 19.86, *et seq.*; and the Washington State Computer Spyware Act, RCW 19.270, *et seq.*; and Defendants Secure Computer, LLC and Paul E. Burke having been personally served with copies of the Summons and Complaint on January 25, 2006, and January 26, 2006, respectively; and

Plaintiff having appeared by and through its attorneys, Rob McKenna, Attorney General; Paula Selis, Senior Counsel; and Katherine M. Tassi, Assistant Attorney General; and Defendant Paul E. Burke having appeared through his counsel Spencer D. Freeman; and Defendant Secure Computer, LLC having appeared through its counsel Robert S. Apgood; and

Plaintiff and Defendants having agreed on a basis for the settlement of the matters alleged in the Complaint, and to the entry of this Consent Decree (hereinafter referred to as “Decree”) against Defendants without the need for trial or adjudication of any issue of law or fact; and

Defendants recognize and state that this Decree is entered into voluntarily and that no promises or threats have been made by the Attorney General's Office or any member, office, agent or representative thereof to induce them to enter into this Consent Decree, except as provided herein; and

Defendants further agree that they will not oppose the entry of this Consent Decree on the grounds the Consent Decree fails to comply with Rule 65(d) of the Federal Rules of Civil Procedure, and hereby waive any objections based thereon; and

1 Defendants waive any right they may have to appeal from this Consent Decree; and

2 Plaintiff and Defendants having agreed that this Consent Decree does not constitute  
3 evidence or an admission regarding the existence or non-existence of any issue, fact, or  
4 violation of any law alleged by Plaintiff, but rather enter the Decree to dispense from further  
5 litigation and litigation costs; and

6 Defendants further agree that this Court shall retain jurisdiction of this action for the  
7 purpose of implementing and enforcing the terms contained herein; and

8 The Court having determined there is no just reason for delay in the entry of this  
9 Decree against Defendants, and being fully advised; and

10 The Court finding no just reason for delay;

11 NOW, THEREFORE, it is hereby ORDERED, ADJUDGED, AND DECREED as  
12 follows:

## 13 II. GENERAL

14 2.1 The Court has jurisdiction of the subject matter of this action and of the parties  
15 hereto pursuant to 28 U.S.C. § 1331 for claims asserted under 15 U.S.C. § 7701, *et seq.* and  
16 28 U.S.C. § 1367, and for the claims asserted under RCW 19.86 *et seq.* and RCW 19.270  
17 *et seq.* As a substantial portion of the acts complained of in the action filed by Plaintiff  
18 occurred in King County and elsewhere in the Western District of Washington, venue in this  
19 district is appropriate pursuant to 18 U.S.C. § 1391.

20 2.2 Unless otherwise specified, the term “Defendants” as used in this document  
21 shall mean Paul E. Burke, individually, and Secure Computer, LLC.

22 2.3 Defendant Secure Computer, LLC was served a copy of the Summons and  
23 Complaint on January 25, 2006, and Defendant Paul E. Burke was served on January 26, 2006.

## 24 III. INJUNCTIONS

25 3.1 The injunctive provisions of the Consent Decree shall apply to all persons or  
26 entities in active concert or participation with Defendants, including but not limited to

1 Defendants and Defendants' successors, assigns, transferees, officers, agents, servants,  
2 directors, employees, independent contractors, representatives, and/or affiliates.

3 3.2 Defendants shall inform all persons or entities in active concert or participation  
4 with Defendants, including but not limited to Defendants and Defendants' successors, assigns,  
5 transferees, officers, agents, servants, directors, and employees, of the terms and conditions of  
6 this Consent Decree. Defendants shall inform independent contractors, representatives, and/or  
7 affiliates of the terms and conditions of this Consent Decree only if Defendants are not able to  
8 retain full control of any advertising sent or issued by the independent contractor,  
9 representative, or affiliate.

10 3.3 Defendants and all persons or entities in active concert or participation with  
11 Defendants, including but not limited to Defendants and Defendants' successors, assigns,  
12 transferees, officers, agents, servants, directors, employees, independent contractors,  
13 representatives, and affiliates, are hereby enjoined and restrained in the state of Washington or  
14 from a location outside the state of Washington where such conduct affects Washington  
15 residents, from:

- 16 a. Misrepresenting, directly or by implication, the urgency, exclusivity, or need for  
17 products or services in the context of any advertising or marketing of services or  
18 products, including, but not limited to, using any language, symbols, or other visual or  
19 verbal messages that misrepresent to the user that the user's computer is at a risk that  
20 necessitates purchasing the product, or using methods such as repeated pop-ups that  
21 warn or remind the user of problems detected on the computer by a free scan, provided  
22 that reminder windows or pop-ups may be used to encourage purchase of Defendants'  
23 products if: (1) there is a clear, conspicuous and prominent option on the window or  
24 pop-up itself that allows the user to completely uninstall Defendants' software; (2) the  
25 option to uninstall discloses that the user may use the uninstall option to assure they  
26 will receive no additional reminders or pop-ups from Defendants; (3) upon selection of

1 the uninstall option, should selection of the uninstall option itself not lead to directly  
2 uninstalling the software, provide understandable, unambiguous, explicit directions for  
3 uninstalling Defendants' software that conform to industry standards for the  
4 uninstallation of software, and do not contain any text apart from the directions  
5 themselves; and (4) the uninstall option and following the directions for uninstall  
6 results in the complete uninstallation of Defendants' software from the user's computer.

7 b. Misrepresenting, before a consumer has downloaded any of Defendants' software, that  
8 a computer may be infected with spyware, malware, adware, a virus, or any similar  
9 allegedly harmful software by utilizing pop-up, pop-under, banner, skyscraper, or any  
10 form of Internet advertisements that simulate computer systems error warnings  
11 appearing to originate from the consumer's computer or from a source other than  
12 Defendants.

13 c. Misrepresenting directly or by implication, before a consumer had downloaded any of  
14 Defendants' software, that a consumer's computer is at a present or elevated risk  
15 through the use of language or symbols on any Internet advertising.

16 d. Misrepresenting, before a consumer has downloaded any of Defendants' software, that  
17 spyware, malware, adware, a virus, or any other similar allegedly harmful software has  
18 been detected on a user's computer.

19 e. Misrepresenting any material feature of a spyware removal program, including, but not  
20 limited to, the number or nature of the spyware definitions, signatures, items, traces, or  
21 other spyware elements that a spyware removal product detects or removes.

22 f. Misrepresenting that a file or application on a consumer's computer is spyware when  
23 the file or application has been placed on the consumer's computer by, or is a function  
24 of, Defendants' software.

25 g. Misrepresenting that a spyware removal product detects, removes, blocks, or otherwise  
26 prevents all, or substantially all, spyware on a computer.

- 1 h. Misrepresenting the performance, benefits, or features of any computer software  
2 product that is marketed or sold by Defendants.
- 3 i. Entering into any kind of arrangement involving consideration whereby Defendants'  
4 computer software products are marketed, promoted or sold in a manner unknown to  
5 Defendants, including, by not limited to, marketing or promotion by affiliates when the  
6 manner of such promotion is unknown to Defendants. For purposes of this injunction,  
7 the manner of promotion shall be deemed to be known if Defendants obtain and review  
8 copies of promotional advertising to ensure it complies with the injunctive provisions  
9 herein.
- 10 j. Marketing, advertising, promoting, or selling computer software or other products by  
11 means of commercial electronic mail containing false headers.
- 12 k. Marketing, advertising, promoting, or selling computer software or other products by  
13 means of commercial electronic mail containing deceptive subject lines.
- 14 l. Marketing, advertising, promoting, or selling computer software or other products by  
15 means of commercial electronic mail that fails to include a functional opt-out  
16 mechanism.
- 17 m. Marketing, advertising, promoting, or selling computer software or other products by  
18 means of commercial electronic mail that fails to provide notice to the recipient of the  
19 option to opt out of receiving future commercial electronic mail from Defendants.
- 20 n. Marketing, advertising, promoting, or selling computer software or other products by  
21 means of commercial electronic mail that fails to identify clearly and conspicuously  
22 that the commercial electronic mail is an advertisement.
- 23 o. Failing to honor consumers' requests to opt out of receiving future commercial  
24 electronic mail the Defendants.
- 25 p. Obscuring the transmission path and/or misrepresenting the point of origin of any  
26 commercial electronic mail between Defendants and the recipient.

- 1 q. Failing to include a physical address in any commercial electronic mail.
- 2 r. Initiating the transmission of, or procuring the transmission of, commercial electronic
- 3 mail that violates any section of 15 U.S.C. § 7701, *et seq.* (CAN-SPAM Act),
- 4 including, but not limited to, using false headers or deceptive subject lines, obscuring
- 5 the transmission path and/or misrepresenting the point of origin of the mail, failing to
- 6 provide a functional opt-out mechanism, failing to provide notice to the recipient of the
- 7 option to opt-out of receiving future email from Defendants, failing to identify clearly
- 8 and conspicuously that the commercial mail is an advertisement, failing to provide a
- 9 physical address in the mail, and failing to honor consumer's requests to opt-out of
- 10 receipt of future emails from Defendants.
- 11 s. Misrepresenting in the marketing, advertising, or sale of computer software or other
- 12 products that the consumer's computer is at risk.
- 13 t. Misrepresenting in the course of advertising, marketing, or selling a product that the
- 14 cost of a product is a "discounted" price, when, in fact, the item can be purchased at the
- 15 price at any time.
- 16 u. Misrepresenting in the course of advertising, marketing or selling a product that the
- 17 product is available at a specified price for a limited time only, when, in fact, the
- 18 product can be purchased at that price at any time.
- 19 v. Failing to disclose clearly and conspicuously that any advertisement for any product is
- 20 an advertisement.
- 21 w. Offering for download onto a user's computer any software including, but not limited
- 22 to, a "free scan," that adds to, deletes from, erases, or creates Hosts files on a user's
- 23 machine without the express disclosure, prior to the download, of what the software
- 24 will do to the Hosts file and for what reason.
- 25 x. Modifying without clear and conspicuous disclosures, and affirmative consent by the
- 26 computer user, by means of software downloaded onto the user's computer any

1 computer settings, files, or keys that can be used by the consumer to increase the  
2 computer's security.

3 y. Misrepresenting, after a computer user has downloaded Defendants' "free scan" or  
4 similar software and a scan has been performed on the computer, that spyware or  
5 similar alleged threat has been detected.

6 z. Utilizing "buttons" on any form of advertisement or marketing of any product that do  
7 not function as the user would expect them to function based on the commonly  
8 understood and accepted purpose of the button, including, but not limited to, "cancel"  
9 buttons that, when clicked upon, redirect the user to a Web site by opening a new  
10 browser window; "x" buttons that fail to close the advertisement, dialogue box, or  
11 browser window, or open another advertisement, dialogue box, or any other form of  
12 pop-up; and "no" buttons that redirect the user to Defendants' or any other Web site.

13 Nothing in this provision shall prohibit Defendants from purchasing advertisement  
14 space from third parties that appears when a user exits a window generated by a third  
15 party; from using the "x" button to launch an exit pop-up window from Defendants'  
16 own Web sites; or from launching an advertisement upon a user's election to uninstall  
17 Defendants' software, provided that the advertisement does not interrupt the uninstall  
18 process once it has begun, and contains an option to return directly to the uninstall  
19 option, or from launching an advertisement upon a user's termination of an installation.

20 aa. Failing to use commercially reasonable efforts consistent with industry standards and  
21 technology to remove entirely all software files from user's computer in the uninstall  
22 process, including, but not limited to, executables and icons.

23 bb. Misrepresenting the risks that any product or services are designed to address, or the  
24 benefits or cost of any products or services.

25 cc. Misrepresenting the utility, substance, or effect of any scan of the consumer's  
26 computer.



dd. Failing to disclose the terms which are material to a consumer's decision to purchase Defendants' products or services, including, but not limited to, the effect of Defendants' software on software existing on the consumer's computer and the effect of Defendants' software on the functionality of the computer.

ee. Installing software on a consumer's computer that remains after the consumer has uninstalled the free scan or free trial version of Defendants' products, the function of which is to produce pop-ups, advertisements, free scans, executables, icons or reminders of Defendant's products or services.

ff. Misrepresenting, either directly or by implication, the origin of Defendants' advertising, including but not limited to simulations of system alerts, warnings, Netsend or Windows Messenger notices, simulations of Microsoft Windows Security dialogue boxes, or the use of colors, text or layout deceptively conveying the impression that Defendants' advertising originates from Microsoft or an entity other than Defendants.

gg. Installing software on a consumer's computer that downloads and executes without the consumer's knowledge or consent, or whose utility or function goes beyond the consent the consumer granted to the download.

#### IV. RESTITUTION

4.1 Pursuant to RCW 19.86.080, Defendants shall provide \$75,000.00 as restitution to Washington consumers, which shall be distributed in the manner described in Paragraphs 4.2 to 4.4 below.

4.2 Within two weeks of the date of the entry of this Decree, Defendants shall send an email whose subject line reads: "Washington Attorney General and Secure Computer, LLC Solicit Refund Requests for Spyware Cleaner and Pop-up Padlock Programs." The "From" line shall read: "Secure Computer, LLC Refund Program." This email shall be sent to all prior Washington purchasers of Defendants' Spyware Cleaner program and Pop-up Padlock program

1 purchased as an up-sell from a purchase of Spyware Cleaner, and shall read as follows, with no  
2 other text included:

3 Dear Washington Customer:

4 Pursuant to a court-approved settlement of a lawsuit instituted by the State of  
5 Washington, you are entitled to a refund for the purchase of the Spyware  
6 Cleaner and/or Pop-up Padlock programs. Our records indicate that you  
7 purchased either one or both of these programs during the last two years. To  
8 take advantage of this refund program, you must respond to this email within  
9 30 days. By clicking on the reply button, your response will be received and we  
10 will send you a check for a full refund by (date). If your mailing address has  
11 changed, please let us know.

If you would like more information about the refund program or the State of  
Washington's case, please visit its Web site at <http://www.atg.wa.gov/releases>  
(specific URL to be determined).

12 4.3 Within 60 days of the entry of this Decree, Defendants shall mail refund checks  
13 to all Washington consumers who have responded to the email described in Paragraph 4.2, in  
14 the amount of their original purchase(s). Defendants shall not be obligated to send checks to  
15 consumers who do not respond to the email, or in instances where the email originally sent to  
16 the consumer is returned as undeliverable.

17 4.4 Within 75 days of the entry of this Decree, Defendants shall make a report to  
18 Plaintiff identifying the names, amounts, addresses, email addresses and dates of refunds made to  
19 the consumers who were sent checks pursuant to Paragraph 4.3. In the report, Defendants shall  
20 also identify by name, address and amount owed any consumers who Defendants were unable  
21 to contact because the email originally sent to them was returned as undeliverable. If  
22 Defendants receive a reply from a consumer for whom they do not have a physical address,  
23 Defendants shall present to the Washington State Attorney General's Office available  
24 information regarding the consumer.  
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4.5 Within 75 days of the entry of this Decree, Defendants shall return any sums from the \$75,000.00 pool identified in Paragraph 4.1 which remain undistributed after the refund program has been concluded, to the Office of the Attorney General, which, at the discretion of the Office, shall be distributed as additional restitution where practicable, applied toward additional attorney fees or costs, and/or applied toward consumer education. Payment shall be sent to the Office of the Attorney General, Attention: Cynthia Lockridge, Administrative Office Manager, 800 Fifth Avenue, Suite 2000, Seattle, Washington, 98104-3188.

## V. CIVIL PENALTIES

5.1 Pursuant to RCW 19.86.140, Plaintiff shall have and recover, and Defendants shall be liable for and shall pay, civil penalties of \$200,000.00.

5.2 Payment owing under this provision shall be in the form of a valid check paid to the order of the "Attorney General-State of Washington" and shall be due and owing immediately upon entry of the Consent Decree. Payment shall be sent to the Office of the Attorney General, Attention: Cynthia Lockridge, Administrative Office Manager, 800 Fifth Avenue, Suite 2000, Seattle, Washington, 98104-3188.

## VI. ATTORNEYS' COSTS AND FEES

6.1 Pursuant to RCW 19.86.080, Plaintiff shall recover and Defendants shall pay the costs and reasonable attorneys' fees incurred by the Plaintiff in pursuing this matter in the amount of \$725,000.00, payable upon entry of this Consent Decree.

6.2 In any successful action to enforce any part of this Consent Decree, Defendants will pay the Attorney General its attorneys' fees and costs, including reasonable attorneys' fees as provided by RCW 19.86.080.

6.3 Payment owing under this provision shall be in the form of a valid check paid to the order of the "Attorney General-State of Washington" and shall be due and owing immediately upon entry of the Consent Decree. Payment shall be sent to the Office of the

1 Attorney General, Attention: Cynthia Lockridge, Administrative Office Manager, 800 Fifth  
2 Avenue, Suite 2000, Seattle, Washington, 98104-3188.

### 3 **VII. ENFORCEMENT**

4 7.1 Violation of any of the injunctions contained in this Consent Decree, as  
5 determined by the Court, may subject Defendants to civil penalties as deemed appropriate by  
6 the Court, considering the violation, provided that prior to the filing of any petition for  
7 enforcement of the injunctions contained in this Consent Decree, Plaintiff shall notify  
8 Defendants of its intention to do so, and Defendants shall have a reasonable opportunity to cure  
9 any alleged violations of the Consent Decree.

10 7.2 Violation of any of the terms of this Consent Decree, as determined by the  
11 Court, may allow Plaintiff to seek additional remedies including restitution, reasonable  
12 attorneys' fees and costs, and injunctive relief.

13 7.3 This Consent Decree is entered pursuant to RCW 19.86.080. Jurisdiction is  
14 retained for the purpose of enabling any party to this Consent Decree with or without the prior  
15 consent of the other party to apply to the Court at any time for enforcement of compliance with  
16 this Consent Decree, to punish violations thereof, or to modify or clarify this Consent Decree.

17 7.4 Representatives of the Office of the Attorney General of the State of Washington  
18 shall be permitted to access, inspect and/or copy all records or documents relating to sales and  
19 advertisements under control of Defendants solely in order to monitor compliance with this  
20 Consent Decree within 14 days of written request to Defendants, provided that the inspection and  
21 copying shall be done in such a way as to avoid disruption of Defendants' business activities. All  
22 records accessed, inspected, or copied by the Washington Attorney General's Office shall be  
23 kept confidential pursuant to the terms of RCW 19.86.110, and used solely for enforcement of  
24 this Consent Decree. Failure to comply with this section will subject Defendants to a  
25 minimum civil penalty of \$2,000 per day for each day beyond 14 days after the written request  
26

1 that the Attorney General is prevented by Defendants from accessing all records as provided by  
2 this Paragraph.

3 7.5 Representatives of the Office of Attorney General may be permitted to question  
4 Defendants, or any office, director, agent, employees or independent contractor of any  
5 corporation affiliated with Defendants, in deposition, pursuant to the provisions and notice  
6 requirements of Fed. R. Civ. P. 30, in order to monitor compliance with the Consent Decree.  
7 This provision shall not be interpreted to mean that Defendants are required to produce third  
8 parties over whom that have no control for deposition purposes.

9 7.6 Nothing in the Consent Decree shall be construed as to limit or bar any other  
10 governmental entity or consumer from pursuing other available remedies against Defendants.

11 7.7 Under no circumstances shall this Consent Decree or the name of the State of  
12 Washington, the Office of the Attorney General, Consumer Protection Division, or any of their  
13 employees or representatives be used by any Defendants named in the Complaint in connection  
14 with any selling, advertising, or promotion of products or services, or as an endorsement or  
15 approval of Defendants' acts, practices or conduct of business.

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**VIII. DISMISSAL AND WAIVER OF CLAIMS**

8.1 Upon entry of this Consent Decree, all claims in this matter, not otherwise addressed by the Consent Decree are dismissed and waived.

DATED this 30th day of November, 2006.



**RICARDO S. MARTÍNEZ**  
UNITED STATES DISTRICT JUDGE

Approved for Entry and Presented by:

Approved for Entry, Notice of Presentation  
Waived:

ROB MCKENNA  
Attorney General

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PAULA SELIS, WSBA #12823  
Senior Counsel

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SPENCER FREEMAN, WSBA #25069  
Attorney for Defendant Paul E. Burke

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KATHERINE TASSI, WSBA #32908  
Assistant Attorney General  
Attorneys for Plaintiff  
State of Washington

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ROBERT APGOOD, WSBA #31023  
Attorney for Defendant Secure Computer,  
LLC

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PAUL E. BURKE  
Defendant

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SECURE COMPUTER, LLC  
Defendant